No. SC86519

IN THE
SUPREME COURT OF MISSOURI

SIX FLAGS THEME PARKS, INC.,

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

Petition for Judicial Review
From the Missouri Administrative Hearing Commission
The Honorable Karen A. Winn, Commissioner

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This case is a petition for judicial review from a decision of the Administrative Hearing Commission (AHC), rendered under § 621.050,[1] finding that Respondent, Six Flags Theme Parks, Inc., was entitled to a refund of sales taxes it had previously remitted to the Director of Revenue.

Six Flags, which operates a place of amusement, sought a refund of sales taxes it had collected from its customers on fees it had charged them to use inner tubes in its water park. The AHC, relying on this Court's decisions in *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), and *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526 (Mo. banc 2003), determined that the inner tube fees were not taxable under § 144.020.1(2) (the amusement tax), because a more "specific" taxing provision, § 144.020.1(8) (the lease tax), applied to exempt the inner-tube fees from tax. The AHC reached this result despite the fact that a more recent decision of this Court in *Eighty Hundred Clayton Corp.*

[1]All sectional references are to the 2000 Revised Statutes of Missouri, unless otherwise indicated.

d/b/a Tropicana Lanes v. Director of Revenue, 111 S.W.3d 409 (Mo. banc 2003) (*Tropicana*), seemingly dictated the opposite result.

Jurisdiction is proper in this Court because this appeal involves the construction of one or more revenue laws of this state. Mo. Const. art. V, § 3; § 621.189, RSMo Cum. Supp. 2004.

STATEMENT OF FACTS

This case involves Six Flags's application to the Director of Revenue for a refund of $23,490.73 in sales taxes it collected from its customers on fees it charged for the use of inner tubes in its water park. Six Flags sought a refund of taxes it collected on those fees for June through September 2000. (L.F. 243).[2] The Director denied Six Flags's refund claim, and Six Flags appealed that decision to the AHC. (L.F. 243, 246). The AHC determined that Six Flags was entitled to a refund of the sales taxes its customers paid on the fees Six

[2]Six Flags's filed two separate complaints with the AHC. (L.F. 246). The first complaint (AHC case number 03-1919 RS) involved the June through September 2000 tax period. (L.F. 1-78, 243, 246). The second complaint (AHC case number 04-0144 RS) involved the tax period from May 2001 through September 2003, for which Six Flags was claiming an addition refund totaling $76, 473.82. (L.F. 83-234, 243, 246). The AHC later ordered these cases to be consolidated, (L.F. 245-46), but the record does not show that the AHC has taken any action on Six Flags's second complaint.

Flags charged to use the inner tubes.[3] (L.F. 253).

Six Flags operates a "theme park" park near Eureka, Missouri. (L.F. 241, 247). Six Flags charges an admission fee to enter the park, and it collects and remits to the Director sales tax on these fees. (L.F. 241, 247). The park not only offers amusement rides, such as roller coasters and Ferris wheels, but it also contains a water park area offering various water rides and a wave pool. (L.F. 241, 247). Six Flags imposes no separate charge to ride on these water rides or to swim in the wave pool. (L.F. 241, 247). Some of the water rides require the use of an inner tube, which Six Flags provides to its customers without charge. (L.F. 241, 247).

[3]The AHC determined that Six Flags was entitled to a refund of $7,853 for the June 2000 tax period and a refund of $15,637.00 for the July through September 2000 tax period ("summer tax period"). (L.F. 253).

These “free” inner tubes, which are color-coded, must remain at the ride location from which they are obtained, and a customer is not allowed to take a free inner tube to a different location within the water park. (L.F. 241, 247).

Customers can pay a fee, however, for the privilege of obtaining a “paid” inner tube for their immediate and exclusive use within the water park area. (L.F. 241, 247). Customers obtain these inner tubes by paying Six Flags a fee at a kiosk, which is located near the showers and changing room and is roughly equidistant from the wave pool and water rides. (L.F. 241, 247). Paid inner tubes are the same size as the free inner tubes, and they are color-coded to distinguish them from the free inner tubes. (L.F. 241, 247).

After paying the fee, Six Flags’s customers could use their paid inner tubes anywhere in the water park where the use of an inner tube was permitted.[4] (L.F. 242, 248). The paid inner tubes could not be taken outside the water park.

[4]Inner tubes could not be used in “Hook’s Lagoon” or on one of the water slides that required the use of a larger raft-type flotation device. (L.F. 242, 248).

(L.F. 242, 248). The only activity in the water park at which inner tubes were permitted to be used, but for which Six Flags provided no free tubes, was the wave pool. (L.F. 242, 248). Consequently, if customers wished to use an inner tube in the wave pool, they had to pay the fee to obtain a paid inner tube. (L.F. 242, 248). But the use of a tube was not required in the wave pool and many customers used the wave pool without an inner tube. (L.F. 242, 248).

On occasion, customers had to wait in line for a "moderate period of time" to obtain a free inner tube to use on those water ride that required their use. (L.F. 242, 248). But customers who had paid the fee to obtain a paid inner tube did not have to wait. (L.F. 242, 248).

Six Flags paid sales tax on its purchases of all inner tubes, both free and paid, that it provided for its customers' use in the water park. (L.F. 242, 248). Six Flags also remitted sales tax collected from its customers on the fees it charged for the use of paid inner tubes. (L.F. 242-42, 248-49).

In 2003, Six Flags filed refund claims with the Director seeking to recover for itself the sales taxes its customers

had paid on the fees Six Flags had charged to use the paid inner tubes for the period from June 2000 through September 2003. (L.F. 243, 248-49). The Director denied these refund claims and Six Flags appealed that decision to the AHC. (L.F. 243, 249).

The AHC, relying on this Court's decisions in *Westwood Country Club v. Director of Revenue* and *Six Flags v. Director of Revenue*, found that Six Flags was entitled to a refund of $23,490.73 in sales taxes it had collected from its customers on the fees it charged them to use the paid inner tubes. (L.F. 85-87). In reaching its decision, the AHC relied on *Westwood* and *Six Flags*, in which this Court held that the taxpayers in those cases were entitled to a refund of sales taxes collected on fees charged to use golf cars (*Westwood*) and video game machines (*Six Flags*). (L.F. 250-51). The AHC distinguished this case from this Court's more recent decision in *Eighty Hundred Clayton Corp. v. Director of Revenue*, which involved a refund claim for taxes collected on fees charged to use bowling shoes, because the facts in this case were "more similar" to *Westwood* and *Six Flags* and because this case did not involve "bowling." (L.F. 251-52). The AHC observed,

however, that the "Director's argument that there is no practical difference between a rental of inner tubes and a rental of bowling shoes seems meritorious to use, and the Director makes a compelling argument that like transactions should be treated equally under the tax laws." (L.F. 252). The Director appeals the AHC's decision to this Court.

POINT RELIED ON

The AHC erred in awarding Six Flags a refund of the sales taxes that its customers paid on the fee Six Flags charged to use inner tubes within its water park and in holding that Six Flags's inner tube fee was not taxable, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under the amusement tax (§ 144.020.1(2), RSMo Cum. Supp. 2004), which taxes all fees paid in or to a place of amusement in that: 1) Six Flags operated a place of amusement, and the fee it charged to use inner tubes was a fee paid in or to a place of amusement; 2) Six Flags's inner-tube fee transaction did not constitute the lease or rental of tangible personal property, and, thus, the lease tax (§ 144.020.1(8), RSMo Cum. Supp. 2004) did not apply; 3) this Court should abandon the specific-vs.-general theory of taxation articulated in *Westwood Country Club v. Director of Revenue*, suggesting that since the lease tax is more "specific" than the amusement tax, a specific tax exemption applicable only to the lease tax operates to exempt from tax

transactions clearly falling under the amusement tax; and 4) this case is controlled by this Court's recent decision in *Eighty Hundred Clayton Corp. d/b/a Tropicana Lanes v. Director of Revenue*, which held that fees charged to use bowling shoes were not exempt from the amusement tax.

Eighty Hundred Clayton Corp. d/b/a Tropicana Lanes v. Director of Revenue, 111 S.W.3d 409 (Mo. banc 2003);

Blue Springs Bowl v. Spradling, 551 S.W.2d 596 (Mo. banc 1977);

J.B. Vending v. Director of Revenue, 54 S.W.3d 183 (Mo. banc 2001);

Section 144.010.1(3), RSMo 2000;

Section 144.010.1(10), RSMo 2000;

Section 144.020.1(2), RSMo 2000;

Section 144.020.1(8), RSMo 2000;

Section 144.021, RSMo 2000.

ARGUMENT

The AHC erred in awarding Six Flags a refund of the sales taxes that its customers paid on the fee Six Flags charged to use inner tubes within its water park and in holding that Six Flags's inner tube fee was not taxable, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under the amusement tax (§ 144.020.1(2), RSMo Cum. Supp. 2004), which taxes all fees paid in or to a place of amusement in that: 1) Six Flags operated a place of amusement, and the fee it charged to use inner tubes was a fee paid in or to a place of amusement; 2) Six Flags's inner-tube fee transaction did not constitute the lease or rental of tangible personal property, and, thus, the lease tax (§ 144.020.1(8), RSMo Cum. Supp. 2004) did not apply; 3) this Court should abandon the specific-vs.-general theory of taxation articulated in *Westwood Country Club v. Director of Revenue*, suggesting that since the lease tax is more "specific" than the amusement tax, a specific tax exemption applicable only to the lease tax operates to exempt from tax

transactions clearly falling under the amusement tax; and 4) this case is controlled by this Court's recent decision in *Eighty Hundred Clayton Corp. d/b/a Tropicana Lanes v. Director of Revenue*, which held that fees charged to use bowling shoes were not exempt from the amusement tax.

Six Flags operates a theme park and charges its customers a fee to use inner tubes in its water park. Section 144.020.1(2), RSMo Cum. Supp. 2004, (the amusement tax) imposes a tax on "fees paid to, or in any place of amusement." Six Flags is admittedly a place of amusement, and this Court has construed the amusement tax as imposing a tax on *all* fees paid in or to a place of amusement. *See Blue Springs Bowl v. Spradling*, 551 S.W.2d 596, 599 (Mo. banc 1977). Six Flags's inner tube fee was taxable under the amusement tax.

Although Six Flags's inner tube fee was taxable under the amusement tax, the AHC relied on *Westwood Country Club v. Director of Revenue*, 6 S.W.3d 885 (Mo. banc 1999), and *Six Flags Theme Parks, Inc. v. Director of Revenue*, 102 S.W.3d 526 (Mo. banc 2003), in deciding that the inner tube fee was not subject to tax. In *Westwood* and *Six Flags*, this Court stated that the lease tax (§ 144.020.1(8)) was more "specific" than

the amusement tax and that a tax exemption found within the lease tax provisions applied to exempt a fee paid in or to a place of amusement from taxation altogether.

But the continued vitality of the statements from *Westwood* and *Six Flags* has now been called into question by this Court's more recent holding in *Eighty Eight Hundred Clayton Corp. d/b/a Tropicana Lanes v. Director of Revenue*, 111 S.W.3d 409 (Mo. banc 2003) (*Tropicana*). In *Tropicana*, this Court held that a fee charged to use bowling shoes in a place of amusement was subject to sales tax notwithstanding the taxpayer's argument that its fee was not taxable under *Westwood* and *Six Flags* because it paid sales tax when it purchased the shoes. *Id.* at 410-11.

The lease tax, however, does not apply in this case because the fee Six Flags charged its customers to use inner tubes was a mere license and did not constitute the lease or rental of tangible personal property. Moreover, the specific-vs.-general theory of taxation relied on by this Court in *Westwood* and *Six Flags* should be abandoned because it is contrary not only to the holdings in *Blue Springs* and *Tropicana*, but also to the plain language of the sales tax

law. Nothing in the sales tax law, especially the amusement tax, distinguishes between fees charged by places of amusement depending on whether they are paid in bowling alleys, golf courses, theme parks, or any other place of amusement or recreation.

A. Standard of review.

The AHC's decision is upheld only when authorized by law, supported by competent and substantial evidence upon the record as a whole, and not clearly contrary to the reasonable expectations of the General Assembly. *See Becker Elec. Co. v. Director of Revenue*, 749 S.W.2d 403, 405 (Mo. banc 1988); §621.193. This Court owes no deference to the AHC's decisions on questions of law, which are matters for this Court's independent judgment. *La-Z-Boy Chair Co. v. Director of Econ. Dev.*, 983 S.W.2d 523, 524-25 (Mo. banc 1999); *Hewitt Well Drilling & Pump Serv. v. Director of Revenue*, 847 S.W.2d 797, 797 (Mo. banc 1993). Because Six Flags has filed a refund claim seeking the return of sales taxes it had collected from its customers and paid to the Director, it has the burden of proof. Sections 136.300 and 621.050.2.

B. The amusement tax applies to any and all fees paid by patrons to a place of amusement.

Under the amusement tax, all fees paid in or to a place of amusement are taxable. Although Six Flags's inner tube fee was taxable under the amusement tax, the AHC relied on *Westwood* and *Six Flags* in holding that the fee was not

taxable. In those cases, this Court determined that such fees were entirely exempt from tax because a provision contained within a more "specific" tax — the lease tax — exempted the transaction from the tax. But whether the transaction was taxable under the lease tax does not affect its taxability under the amusement tax.

1. The fee Six Flags charged its customers to use inner tubes in its water park was subject to the amusement tax.

State law authorizes a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." Section 144.020.1, RSMo Cum. Supp. 2004. The legislature intended to broadly tax all sales of tangible personal property or taxable services and to identify specific tax rates applicable to particular types of sales:

> Considered in context, the statute as a whole evinces a legislative intent to tax all sellers for the privilege of selling tangible personal property or rendering a taxable service. The purpose of the specific subsections thereunder is to set out the types of retail sales and services that shall be taxed at particular rates.

J.B. Vending Co. v. Director of Revenue, 54 S.W.3d 183, 188 (Mo. banc 2001). Section 144.020.1 divides sales into eight categories relating either to sales of personal property or taxable services and applies a specific tax rate for each category. One of these categories is the so-called amusement tax, which imposes:

> A tax equivalent to four percent of the amount paid for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events;

Section 144.020.1(2), RSMo Cum. Supp. 2004.

Authority to tax fees paid in or to places of amusement is also found in the statutory definition of "sale at retail." Sellers are required to pay sales tax on their gross receipts, which is "the aggregate amount of the sale price of all sales at retail." Section 144.021. The phrase "sale at retail," includes "[s]ales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events." Section 144.010.1(10), RSMo Cum. Supp. 2004.

This Court has held that the "simple general language" of

the amusement tax "is not limited or qualified in any way." *Blue Springs Bowl*, 551 S.W.2d at 599. "It applies to *all* such fees paid to or in" places of amusement. *Id.* (emphasis in original); *see also Bally's LeMan's Family Fun Centers, Inc. v. Director of Revenue*, 745 S.W.2d 683, 685 (Mo. banc 1988) ("Section 144.020.1(2) . . . expresses a legislative intent to tax all fees paid in places of amusement . . . ."). Section 144.020.1(2) "plainly provides for a sales tax to be imposed: (1) on sums paid for admission to places of amusement, etc.; (2) on amounts paid for seating accommodations therein; and (3) on *all* fees paid to, or in places of amusement, etc." *L & R Distrib. Co. v. Missouri Dep't of Revenue*, 648 S.W.2d 91, 95 (Mo. 1983) (emphasis in original). In *Tropicana*, this Court held that "all fees paid in or to a place of amusement are taxable, even if the fee is not strictly for amusement activities." *Tropicana*, 111 S.W.3d at 410. *See also City of Springfield v. Director of Revenue*, 659 S.W.2d 782, 783-84 (Mo. banc 1983) (holding that the amusement tax applied to sales of items at concession stands located in places of amusement or recreation); *Old Warson Country Club v.*

Director of Revenue, 933 S.W.2d 400, 403 (Mo. banc 1996) (holding that a capital improvements assessment charged to country club members constituted a fee paid in or to a place of amusement, but ultimately holding that the fee was not taxable because it was not a sale at retail).

Consequently, to find a transaction taxable under the amusement tax only "two elements are essential, — that there be fees or charges and that they be paid *in or to* a place of amusement." *L & R Distrib., Inc. v. Missouri Dep't of Revenue*, 529 S.W.2d 375, 378 (Mo. 1975) (emphasis added). The legislature also intended to tax "any amount paid after admission to a place of amusement." *Id.*

The fee Six Flags charged its customers to use inner tubes was taxable under the amusement tax. First, not only did Six Flags admit that it operated a place of amusement (L.F. 241), but this Court has also previously held that Six Flags operates a place of amusement. *See Six Flags*, 551 S.W.2d at 598.

Second, Six Flags charged its customers a fee to use inner tubes. Although not specifically required to make this fee subject to the amusement tax, Six Flags's fee was also

directly related to its customers' participation in the amusement activities provided in the water park. "Free" inner tubes could only be used on the water rides at which they were provided and could not be taken into the wave pool area. (L.F. 242). Customers were required to pay the inner-tube fee if they wished to float on an inner tube in the wave pool.[5] (L.F. 242). In addition, customers were required to pay the inner-tube fee if they wished to avoid waiting in line for a "free" inner tube at the water rides on which Six Flags required its customers to use an inner tube. (L.F. 242).

In *Tropicana*, this Court held that the fee a bowling alley charged to use bowling shoes was subject to the amusement tax despite the fact that bowlers could bring and use their own shoes, and, thus, were not required to pay the

[5]The parties stipulated that "if a patron desires to float on an inner tube in the wave pool, the patron ***must*** use a paid inner tube." (L.F. 242) (emphasis added).

bowling-shoe fee to participate in the amusement activity. *Tropicana*, 111 S.W.3d at 410-11. But here, while Six Flags's customers can avoid the inner-tube fee if they choose to enter the wave pool without an inner tube or to wait in line to use a free-inner tube, they were forced to pay the inner-tube fee if they wish to float in the wave pool or wanted to avoid waiting in line to participate in a water ride requiring the use of an inner tube.

Thus, the inner tube fee was taxable under the amusement tax without any further inquiry, and Six Flags is not entitled to a refund of the taxes it collected from its customers.

C. The lease tax does not apply to the fee Six Flags charged its customers to use inner tubes in its water park.

In relying on *Westwood* and *Six Flags* to find that Six Flags was entitled to a refund in this case, the AHC necessarily determined that Six Flags's inner tube fee constituted an amount charged for the lease or rental of tangible personal property, normally taxable under the lease tax (§144.020.1(8)). But the lease tax does not apply to the fee Six Flags charged in this case because paying a fee to use an inner tube within the confines of Six Flags's water park

did not constitute a lease or rental agreement. To the extent this Court's decision in *Six Flags* suggests otherwise, it should not be followed.

2. The language and history of the lease tax shows that the Six Flags's inner tube fee was a mere license to use personal property for amusement activities and did not constitute a "lease" or "rental" agreement.

The lease tax, § 144.020.1(8), imposes a tax on "the amount paid or charged for rental or lease of tangible personal property." Obviously, before a transaction is taxable under the lease tax, it must involve a lease or rental of tangible personal property. Although the words "rent" or "lease" are not specifically defined under Chapter 144, other definitions contained in that chapter shed light on what the legislature intended when it enacted § 144.020.1(8).

Taxpayers are required to pay tax on their "gross receipts," which is the "aggregate amount of the sales price of all sales at retail." Section 144.021. The phrase "gross receipts" includes lease or rental payments only when continuous possession of tangible personal property is granted

under a lease or contract:

> [Gross receipts] shall also include the lease or rental consideration where the right to continuous possession or use of any article or tangible personal property is granted under a lease or contract and such transfer of possession would be taxable if outright sale were made, and, in such cases, the same shall be taxable as if outright sale were made and considered as a sale of such article, and the tax shall be computed and paid by the lessee upon the rentals paid.

Section 144.010.1(3), RSMo Cum. Supp. 2004.

Two important rules of statutory construction must be kept in mind when construing this tax exemption. First, exclusions or exemptions from tax are strictly construed against the party claiming such. *See State ex rel. Union Elec. Co. v. Goldberg*, 578 S.W.2d 921, 923 (Mo. banc 1979). Despite the fact that this provision appears in a taxing statute, it is, nevertheless, an exemption from tax and must be strictly construed against Six Flags, which contends that its inner-tube fee is exempt from the lease tax.

Although the *Six Flags* court stated that § 144.020.1(8)

does not describe an exemption, but imposes a tax, *Six Flags*, 102 S.W.3d at 529, this observation does not fully appreciate the structure of subdivision (8). While this subdivision imposes a tax on lease or rental proceeds, it also contains a proviso granting a tax exemption from that particular tax under certain conditions. Thus, while the provision imposing the tax should be strictly construed against the Director, the proviso containing the tax exemption should be strictly construed against the taxpayer.

The second rule of construction applicable to this case concerns provisos to legislation. The lease tax exemption, which follows the word "provided" in subdivision (8), is a proviso that qualifies as an exception to that subdivision. *See Lonergan v. May*, 53 S.W.3d 122, 130 (Mo. App. W.D. 2001). "Generally, a proviso is confined to the clause or distinct portion of the statute to which it pertains." *Id.* "The natural and appropriate office of a proviso is to create a condition precedent; to except something from the enacting clause; to limit, restrict, or qualify the statute in whole or in part; or to exclude from the scope of the statute that which would otherwise be within its terms.'" *Id.*, (quoting 73

Am. Jur. 2d *Statues* § 318 (1974)). *See also Brown v. Patterson*, 124 S.W. 1, 6 (Mo. 1909). A proviso is not considered separate legislation, and it does not enlarge or extend the provision to which it is attached. *See Thoroughbred Ford Inc. v. Ford Motor Co.*, 908 S.W.2d 719, 729 (Mo. App. E.D. 1995); *Brown*, 124 S.W. at 6. It only limits or restricts the general language preceding it. *See Brown*, 124 S.W. at 6. Finally, a "proviso can have no existence apart from the provision it is designated to limit or qualify." *State ex inf. Taylor v. Kiburz*, 208 S.W.2d 285, 288 (Mo. banc 1948).

The *Westwood* court applied the tax exemption proviso in the lease tax to transactions that were taxable under the amusement tax. This is contrary to the rule that limits application of a proviso to only that part of the statute it qualifies. In other words, the lease tax exemption applied only to the lease tax; it cannot be imported and used to exempt from tax transactions that are taxable under other subdivisions of § 144.020.1. Using the lease tax exemption to exempt a transaction from the amusement tax violates the rule limiting a proviso to the specific statutory provision it

qualifies.

Further understanding of the legislature's intent in passing the lease tax can be gained by examining the historical context behind its enactment. "The history of the evolution of the law into its present shape throws light upon the intention of the lawmakers, and aids in arriving at the true meaning" of a statute. *State ex rel. Frisby v. Stone*, 152 Mo. 202, 53 S.W. 1069, 1070 (1899); *see also Cummins v. Kansas City Pub. Serv. Co.*, 334 Mo. 672, 66 S.W.2d 920, 925 (1933) ("the manifest purpose of the statute, considered historically, is properly given consideration"). The history behind the passage of the lease tax shows that the legislature never intended that an amusement park's fee imposed on its customers for the use of personal property for amusement activities within the park constituted a lease or rental agreement.

Beginning in 1935, just after the passage of the sales tax act, a dispute arose concerning whether transactions involving the lease or rental of tangible personal property that required servicing were taxable. *International Bus. Mach. Corp. v. State Tax Comm'n*, 362 S.W.2d 635, 637 (Mo.

1962). That controversy abated in 1946 with an agreement between a taxpayer, IBM, and the taxing authorities providing that only 50% of the rental receipts would be taxed. *Id.* But in 1959, the Department of Revenue advised IBM that only amounts directly attributable to servicing rented machines could be deducted and that IBM must report amounts received from rentals and service separately. *Id.* IBM refused to do this and claimed that no part of its rental or lease receipts were taxable. *Id.*

The transactions at issue involved written contracts entered into between IBM and its customers "for the use or rental of . . . various office and business machines." *Id.* Under the agreement, IBM agreed both to furnish its customer a machine manufactured by IBM and to keep that machine in good working order. *Id.* The agreement, which lasted for at least one year and could thereafter be terminated by either party on thirty days notice, provided for monthly payments to use the machines. *Id.* The agreement also contained other provisions concerning the amount of time the customer could use the machine, the payment of taxes, use of additional machines and other equipment, and the customer's payment of drayage

(shipping) charges. *Id.*

The court held that neither the definition of sale at retail, nor the provisions of § 144.020 then in effect, allowed the taxation of proceeds from rental or lease transactions other than the types expressly identified under the law. *Id.* at 639. The court suggested that if the legislature wanted to tax all rental or lease transactions, then it could amend the sales tax law:

> In short, had the legislature desired or intended to impose a sales tax on any and all lease transactions it would have been a very simple matter to plainly manifest that purpose by express provision in the act. By carefully defining "sale at retail" and purposefully embracing in the definition and the tax certain rental-type transactions, it would appear that other rentals and leases were not embraced.

Id.

A similar result was reached in *Federhofer, Inc. v. Morris*, 364 S.W.2d 524 (Mo. 1963). *Federhofer* involved the lease or rental of automobiles under written contracts. *Id.* at 525. These contracts provided for the lease or rental of

the described vehicle for a period of at least one year with the lessee making payments on a regular basis. *Id.* at 525-26. The contracts also contained numerous provisions relating to vehicle maintenance, depreciation, repossession, insurance, and other matters. *Id.* The Director determined that these transactions were taxable and that sales tax should be collected on the consideration paid for the lease or rental of the vehicles. *Id.* at 525. The court, relying on the decision in *IBM* decided one year earlier, held that the lease or rental of motor vehicles was not a taxable event under § 144.020. *Id.* at 528.

In 1963, the General Assembly responded to the holdings in these two cases by enacting § 144.020.1(8), the lease tax, which imposed a tax on "the amount paid or charged for rental or lease of tangible personal property." 1963 Mo. Laws 196. Three years later, this tax was tested in *International Bus. Mach. Corp. v. David*, 408 S.W.2d 833 (Mo. banc 1966). In that case, IBM contended that the proceeds it received on the rental of its business machines were not taxable despite the passage of the lease tax. *Id.* at 836. This Court rejected that argument and held that the legislature accepted the

invitation the court extended in the 1962 *IBM* case and in *Federhofer* to amend the statute. *Id.* at 836-37. This Court also held that the amendment to § 144.020.1 specifically made these types of lease and rental transactions taxable. *Id.*

These cases form the historical backdrop behind enactment of the lease tax, and they offer guidance in determining the types of transactions the legislature intended to tax. Each case discussed above involved written contracts or leases for the continuous possession or use of tangible personal property over an extended period of time. Moreover, each case involved periodic payments for the lease or rental of this property. The factors present in these cases are also consistent with the statutory definition of "gross receipts," which includes lease or rental proceeds only when the transaction involves "the right to continuous possession or use of . . . tangible personal property . . . granted under a lease or contract." Section 144.010.1(3). Finally, these cases involve true lease or rental transactions as those words are commonly understood and defined by the dictionary.

When construing a statute, "undefined words are given their plain and ordinary meaning as found in the dictionary."

Asbury v. Lombardi, 846 S.W.2d 196, 201 (Mo. banc 1993). As used in this context, the definition of "rent" is "[t]o obtain occupancy or use of (another's property) in return for *regular* payments." THE AMERICAN HERITAGE DICTIONARY 1047 (2d College ed. 1985) (emphasis added). "Rental" is merely "[t]he act of renting." *Id.* "Lease" has been defined as "a contract granting use or occupation of property during a specified period in exchange for a specified rent." *Id.* at 721. "Rent," used as a noun in this definition, is defined as "[p]ayment, usually of an amount fixed by contract, made by a tenant at specified intervals in return for the right to occupy or use the property of another." *Id.* at 1047. "When used with reference to tangible personal property, [lease] means a contract by which one owning such property grants to another the right to possess, use and enjoy it for specified period of time in exchange for periodic payment of a stipulated price, referred to as rent." BLACK'S LAW DICTIONARY 461 (abr. 5th ed. 1983). *See also Six Flags*, 102 S.W.3d at 532-33 (Wolff, J. dissenting) (finding that under Missouri's UCC code, a lease is "statutorily defined as 'a transfer of the right to

possession and use of goods for a term in return for consideration, but a sale, including the sale on approval or a sale or return, or retention or creation of a security interest is not a lease'"). A "license," on the other hand, "is defined as: 'authority or permission of one having no possessory rights in land to do something on that land which would otherwise be unlawful or a trespass — distinguished from lease.'" ***Six Flags***, 102 S.W.3d at 533 (Wolff, J., dissenting) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1304 (3rd ed. 1993)).

In this case, no formal contract was entered into and no regular or periodic payments were made to use the inner tubes; only one fee was charged. And the use permitted for that fee was extremely limited. Six Flags's customers could only use the inner tubes in Six Flags's water park and were prohibited from removing the inner tubes from the water park area. (L.F. 242). This is not the type of transaction the General Assembly sought to tax by passing the lease tax in response to the ***IBM*** and ***Federhofer*** cases. Moreover, this limited use certainly did not constitute "the right to continuous

possession or use . . . granted under a lease or contract." Section 144.010.1(3). Under the circumstances of this case, the permission Six Flags gave its customers to use the inner tubes for a limited purpose at a time and place designated by Six Flags constituted a mere license, not a lease or rental. *See Katz v. Slade*, 460 S.W.2d 608, 613 (Mo. 1970) (holding that a golf course's "rental" of golf carts to golfers for use on the course constituted a license, not a lease); *Esmar v. Zurich Ins. Co.*, 485 S.W.2d 417, 421 (Mo. 1972) (holding that permission given by a landowner, for a charge, to allow parking at any convenient place on a lot is a license, not a lease); *Siciliano v. Capital City Shows, Inc.*, 475 A.2d 19 (N.H. 1984) (a person riding an amusement park ride holds a mere license). *See also Six Flags*, 102 S.W.3d at 532 (Wolff, J., dissenting) ("The relationship Six Flags has with patrons who play the video games resembles more of a licensor-licensee relationship than that of a lessor-lessee.").

3. This Court's decisions in *Westwood* and *Six Flags* are distinguishable do not control resolution of this issue under the facts of this case.

The issue regarding whether transactions of the type

found in this case constitute a lease or rental as the legislature used those words in § 144.020.1(8) was not decided in *Westwood*, the first case to consider whether the lease tax applied to a fee paid to use personal property in a place of amusement or recreation :

> Both parties invite us to determine whether the fees charged by Westwood were for a rental of or license to use golf carts. The fees paid for the use of a golf cart are similar to fees paid for dining at Westwood — dues paid by the club's members cover the purchase, maintenance and use of golf carts. For the purposes of this opinion, we only hold that the golf cart fees were sufficient to qualify for treatment under section 144.020.1(8) in that ambiguities in statutes imposing taxes are to be resolved in the taxpayer's favor.

Westwood, 6 S.W.3d at 888 n.6. In other words, the *Westwood* court likened the golf cart fee to the service charge for meals and drinks at issue in *Greenbriar Hills Country Club v. Director of Revenue*, 935 S.W.2d 36 (Mo. banc 1996) (*Greenbriar I*), as a charge the country club's members assessed against themselves for the purchase, maintenance, and use of golf

carts.[6] The court never expressly held that a fee paid to use a golf cart in a place of amusement or recreation constituted a lease or rental agreement.

In *Six Flags*, this Court relied on *Westwood* in holding that depositing coins into a video game to "purchase[ ] the exclusive right to operate the video game machine for a term governed by the rules of the game . . . constituted a rental agreement." *Six Flags*, 102 S.W.3d at 530. Although the opinion in *Six Flags* states that the *Westwood* court determined that "the golf carts" in that case "were being rented to customers," *Id.* at 529, it overlooks the limitation the *Westwood* court applied to its holding, and the opinion contains no further legal analysis explaining its conclusion that paying to play a video game constitutes a "rental agreement." As demonstrated above, however, a fee paid for the limited and restricted use of tangible personal property within the confines of a place of amusement or recreation is

[6]The affect the decision in *Greenbriar I* has on the issues in this case, particularly the specific-vs.-general theory of taxation, is explained in Part C, *infra*.

merely a license to use the property, not a lease or rental of it.

Moreover, the *Westwood* court's reliance on the rule of construction that ambiguities in taxing statutes are construed in favor of the taxpayer is misplaced. The wording used by the court is shorthand for the more precise version of the rule, which is that "[l]aws imposing taxes are to be strictly construed, and so the right to tax must be conferred by plain language, for it will not be extended by implication." *Kanakuk-Kanakomo Kamps v. Director of Revenue*, 8 S.W.3d 94, 96 (Mo. banc 1999); *see also Blue Springs Bowl*, 551 S.W.2d at 599. In other words, whether a particular transaction falls within the taxing statute must plainly and clearly appear from the words of the statute. *Union Elec. Co. v. Morris*, 222 S.W.2d 767, 770 (Mo. 1949).

Construing the lease tax to include any transaction in which a fee is charged to use personal property on a limited basis is contrary to the rule requiring that taxing statutes be strictly construed. In other words, extending the definition of the words 'lease' and 'rental' to include the payment of a fee to use a golf cart or inner tube constitutes

a broad, not strict or narrow, construction of the lease tax. Proper application of this rule would have resulted in a finding that the transactions at issue in *Westwood*, *Six Flags*, and this case did not constitute the lease or rental of tangible personal property and, thus, did not fall under the lease tax. In *Westwood*, the lease tax was broadly construed to include a transaction that the legislature did not intend to tax so that the taxpayer could take advantage of a tax exemption applicable only to the lease tax and avoid being taxed under the amusement tax, which clearly taxed the transaction in question.

Also, merely because a lay person might described a fee to use an inner tube as a "rental" fee does not by itself prove that the lease tax applied to this transaction. Many transactions are casually referred to as "rentals" when, in fact, they are not under the law. When a word in a statute is obscure, or capable of many meanings, it may be defined by reference to associated words to avoid giving the statute unintended breadth. *See Pollard v. Board of Police Comm'rs*, 665 S.W.2d 333, 341 n.13 (Mo. banc 1984); *O'Malley v. Continental Life Ins. Co.*, 75 S.W.2d 837, 840 (Mo. banc 1934).

To broadly define the word "rental," as it is used in the lease tax, to include all transactions in which one person is permitted to use the property of another, would be inconsistent with the more commonly understood, and restrictive, definition of the word lease and give the statute an unintended breadth.

Under *Westwood*, *Six Flags*, and the AHC's decision in this case, any fee or charge paid in or to a place of amusement to use personal property, even if use of that property either enhances the amusement or recreational aspect of the activity involved or is required to participate, is not subject to tax if the lessor or renter can show that the transaction is exempt from tax under the exemption clause contained in § 144.020.1(8). Under this scheme, charges or fees to use inner tubes, ice skates, go carts, or other equipment would not be taxable if the owner paid sales tax on the original purchase of such equipment. As mentioned above, the lease tax has now been so broadly construed that putting coins in a video game constitutes "a rental agreement." *Six Flags*, 102 S.W.3d at 530. "To characterize a patron who plays a video game at an arcade as a lessee of the video game stretches the common

understanding of 'lease' beyond all recognition." *Id.* at 533 (Wolff, J., dissenting). In this Court's decision in *Tropicana*, on the other hand, this Court did not apply the lease tax exemption to a bowling "shoe rental" fee charged by a bowling establishment. *Tropicana*, 111 S.W.3d at 410-11.

Further proof that the General Assembly did not reasonably expect that any fee charged to use personal property for amusement purposes within a place of amusement would constitute a lease or rental transaction is found within the provisions of the lease tax itself. This provision, adopted in 1985 — well before this Court's decision in *Greenbriar I* — , specifically exempts only the rental or lease of boats and outboard motors from the amusement tax:

> In no event shall the rental or lease of boats and outboard motors be considered a sale, charge, or fee to, for or in places of amusement, entertainment or recreation, nor shall any such rental or lease be subject to any tax imposed to, for, or in such places of amusement, entertainment or recreation.

Section 144.020.1(8), RSMo Cum. Supp. 2004. If charges to rent or lease property in places of amusement were not taxable

under the lease tax, then this exemption would have been mere surplusage. But courts do not presume that the legislature enacted meaningless provisions. *See Wollard v. City of Kansas City*, 831 S.W.2d 200, 203 (Mo. banc 1992). The General Assembly was aware that certain transactions, which might be loosely characterized as lease or rental agreements, within places of amusement or recreation were taxable under the amusement tax. The specific mention of only boats and outboard motors within this lease tax exemption demonstrates that the legislature intended that the rental or lease of other personal property within places of amusement was still subject to the amusement tax.

When a statute expressly mentions the subjects or things on which it operates, it is construed as excluding from its effect all those not expressly mentioned. *See Giloti v. Hamm-Singer Corp.*, 396 S.W.2d 711, 713 (Mo. 1965). Consequently, the existence of a specific amusement tax exemption for the rental or lease of boats and outboard motors found in the lease tax demonstrates that the General Assembly did not intend that fees charged for periodic uses of other personal property be excluded from the amusement tax. *See Six Flags*,

102 S.W.3d at 533-34 (Wolff, J., dissenting). This provision was not considered by either the *Westwood* or *Six Flags* courts in reaching its decisions in those cases.

Another statute contained within the sales tax law provides further support for the argument that the lease tax does not apply to fees paid to use personal property within places of amusement. Section 144.518 exempts from tax "machines or parts for machines used in a commercial, coin-operated amusement and vending business where sales tax is paid on the gross receipts derived from the use of commercial, coin-operated amusement and vending machines." Section 144.518. If the legislature reasonably expected that putting coins into a video game constituted a "rental agreement," then this section would serve no purpose since the lease tax exemption would have operated to exempt the taxpayer's (place of amusement) purchase of these coin-operated amusement devices. This section also reveals that the legislature believes that charges paid to use coin-operated amusement devices within a "commercial, coin-operated amusement . . . business" are fully taxable under the amusement tax. Moreover, the legislature recognized that without this

tax exemption, the sellers of coin-operated amusement machines would owe sales tax on the sale of those machines to places of amusement and that the purchasers of those machines would be required to remit sales tax on the proceeds obtained from customers playing the machines.

Although this statute was passed in 1999, before the decision in *Six Flags* was handed down, it did not apply to the tax periods at issue in *Six Flags* (July 1995 to November 1998). *See Six Flags*, 102 S.W.3d at 527. Consequently, the opinion in *Six Flags* does not address the affect this section has on the construction of the lease and amusement taxes.

In *Six Flags*, this Court supported its application of the lease tax exemption by noting that the purpose of the sales tax law is to "tax property once and not at various stages in the stream of commerce. *Six Flags*, 102 S.W.3d at 530. But § 144.518 shows that property is not being taxed twice, but that sales tax is being applied to two different transactions. The sales tax applicable on the purchase of personal property used and consumed by a place of amusement to provide or enhance amusement activities is different than the tax applicable to fees paid in or to a place of amusement. First,

the taxpayers are not the same. In the first transaction, the taxpayer is the seller of the coin-operated amusement device or machine, who collects tax from the place of amusement purchasing the machine. The transaction being taxed is the retail sale of tangible personal property. In the second transaction, however, the taxpayer is the place of amusement, which collects tax on charges to its customers patronizing its place of amusement. In this case, the transaction being taxed is the amusement activity, which is expressly and separately taxable under the sales tax law. *See* §§ 144.010.10 (definition of "sale at retail"); 144.020.1(1) and (2), RSMo Cum. Supp. 2004.

Six Flags's inner-tube fee was not taxable under the lease tax (§ 144.020.1(8)), because those charges were not "amounts paid or charged for rental or lease of tangible personal property." Since this fee did not fall under the lease tax, it follows that the tax exemption found within that particular tax could not have been employed to exclude this fee from any tax whatsoever. To the extent that *Westwood* and *Six Flags* hold that transactions similar to the one at issue here constitute leases or rentals, they should no longer be

followed.

C. The specific-vs.-general theory of taxation.

But this does not end the inquiry in this case. The AHC, relying on this Court's decisions in *Westwood* and *Six Flags*, determined that Six Flags's fee to use inner tubes was not taxable under the amusement tax. In those cases, this Court held that because a different tax — the lease tax — was applicable to such transactions and because the lease tax was a more "specific" tax, an exemption found only within the provisions of the lease tax applied to exempt such transactions entirely from tax. This construction of the sales tax law, first derived from dictum in a case that did not pertain to a perceived conflict between the amusement and lease taxes, is contrary to the plain language of the taxing statutes and should no longer be followed.

1. The evolution of the specific-vs.-general theory of taxation involving the sales tax law.

The theory that a transaction, though clearly taxable under one subdivision of § 144.020.1, is nevertheless exempt from tax because a more "specific" subdivision of that statute does not apply to the transaction in question was first

articulated in *Greenbriar I*. In that case, the object of the tax was a monthly service charge that a country club collected from its members. *Greenbriar I*, 935 S.W.2d at 36-37. The country club and the Director stipulated that the service charge was used exclusively to cover tipping related to meals and drinks the club sold to its members. *Id.* at 38. The parties also stipulated that the club sold meals and drinks only to its members, and not the public. *Id.*

This Court observed that two taxing provision contained in § 144.02.1 — the amusement tax and the tax on meals and drinks — arguably applied to the transaction. *Id.* Finding that the two taxing provisions were in conflict, this Court concluded that the tax on meals and drinks applied because it was more "specific" than the amusement tax. *Id.* Inferring a negative implication from the fact that the tax on meals and drinks did not tax meals and drinks unless they were served to the public, this Court decided that the service charge was not taxable at all. *Id.* at 38-39. In other words, despite the fact that the service charge was clearly taxable under the amusement tax as a charge paid to a place of amusement, this Court held that it was not taxable under any provision because

a more "specific" taxing provision did not apply to the transaction.

This argument was reanimated, though in a slightly different context, in *Westwood*. There, this Court held that a country club's fee charged to "rent" golf carts was not taxable, though the fee clearly fell under the amusement tax, because the fee was not taxable under the lease tax (§144.020.1(8)). *Westwood*, 6 S.W.3d at 889. This Court, citing *Greenbriar I*, held that the lease tax applied to the transaction because it was more "specific" than the amusement tax. *Id.* Although amounts charged for the lease or rental of tangible personal property are taxable under the lease tax, this Court held that the lease tax itself contained an exemption from tax if sales tax had been paid on the purchase price of the later leased or rented property. *Id.* Because the country club had paid sales tax on its purchases of the golf carts, this Court held that the amounts the club charged to "rent" the golf carts was not taxable at all. *Id.*

The underpinnings of the *Greenbriar I* and *Westwood* decisions, however, were eroded by this Court's later decision in *J.B. Vending*. The decisions in both *Greenbriar I* and

Westwood are based on the idea that when two taxing statutes conflict, the more "specific" statute controls. But in *J.B. Vending*, this Court observed that the two taxing provisions at issue in *Greenbriar I* did not conflict with each other:

> The [*Greenbriar I*] Court determined that where two statutes on the same subject conflict, the more specific controls over the more general. But this precept applies only where the two provisions are in such conflict that they cannot be harmonized. In *Greenbriar [I]*, the two sections could be harmonized by recognizing that subsection (2)'s tax applied only to fees paid to places of amusement. The money paid for meals and tips in *Greenbriar* did not constitute a fee but rather constituted the price of the meal and the service being provided. Hence, the two sections could be harmonized.

J.B. Vending, 54 S.W.3d at 189 n.2. This observation is consistent with the *J.B. Vending* court's holding that § 144.020 should be construed as imposing a tax on all those who sell tangible personal property or a taxable service, and not as creating exemptions from the taxes it imposes. *Id.* at 188.

Moreover, the decision in *Greenbriar I* was driven

primarily by the parties' stipulations and not on the notion that "specific" tax statutes control over general ones. The *Greenbriar I* court recognized that the Director basically stipulated the case away before the AHC: "Upon the facts to which the parties stipulated in this case, this Court agrees with [the taxpayer]." *Greenbriar I*, 935 S.W.2d at 38. This Court's footnote in *J.B. Vending* not only reinforced this conclusion, but it also retreated from the premise that separate subdivisions within § 144.020.1 taxing different transactions could conflict with each other and that a "specific" taxing provision would control over a general one.

The *Westwood* court simply fell into the trap that had been left for it by the dictum contained in the *Greenbriar I* opinion. Unfortunately, the situation was exacerbated by the *Westwood* court's holding that not only was the lease tax was more "specific" than the amusement tax, but also that a provision found only in the lease tax that specifically exempted certain lease and rental transactions from that tax also operated to exempt these transactions from the amusement tax.

Judge Wolff, who authored the *Westwood* opinion, later realized this mistake and questioned this Court's application of the specific-vs.-general rule of statutory construction because the taxing provisions contained in § 144.020 do not conflict:

> [T]he plain language of the rule seems logically to limit its use to when two separate statutes conflict. . . . This rule of construction, though in rare instances applied to conflicting subsections within the same statute, should be used sparingly, and only after the subsections have been thoroughly reviewed and a conflict is clearly established.

In the present statute there is no clear conflict. *Greenbriar Hills Country Club v. Director of Revenue*, 47 S.W.3d 346, 360 (Mo. banc 2001) (Wolff, J., dissenting) [*"Greenbriar III"*]. Judge Wolff concluded that both *Greenbriar Hills I* and *Westwood* should be overruled:

> I believe the Court should revisit and overrule its decision in *Greenbriar Hills I* and its progeny, *Westwood Country Club v. Director of Revenue*, which I wrote and followed the error of *Greenbriar Hills I* — an error that

should not be perpetuated.

Id. at 361-62 [citation omitted].

In *Six Flags*, this Court simply relied on the decision in *Westwood* to exclude from tax the money Six Flags's customers paid to play video games located within its amusement park. *Six Flags*, 102 S.W.3d at 529-30. Finding that depositing money into a video game constituted a "rental agreement," this Court held that the video game receipts were exempt from all taxation because the machines' owner paid sales tax when they purchased the machines, thus triggering the lease-tax exemption. *Id.* Judge Wolff, this time joined by Judge Stith, dissented from this holding and reiterated his contention that *Westwood* should be overruled.[7] *Id.* at 534.

[7]The dissent also noted that the holding in *Six Flags* was contrary to this Court's holding in *Bally's*, which held that the receipts from coin-operated games in places of amusement

were subject to the amusement tax. 745 S.W.2d at 530.

The latest entry in this evolutionary process involved this Court's decision in *Tropicana*. Although the transaction at issue in *Tropicana* involved a refund claim of sales taxes collected on fees charged to use bowling shoes, this Court refused to apply *Westwood* and *Six Flags* to exempt the bowling-shoe fee from tax even though the taxpayer had paid sales tax when it had purchased the shoes. Instead, this Court, retreated from *Westwood* and its progeny, though it found it unnecessary to overrule these cases, and relied on *Blue Springs Bowl* to hold that this fee was subject to the amusement tax. *Tropicana*, 111 S.W.3d at 410-11. This time, the argument that *Westwood* controlled to exempt the shoe fee from tax came from the dissent. *Id.* at 411-12.

2. The specific- vs.-general theory of taxation is unsupported by the plain language of the sales tax law and should be abandoned.

The fee Six Flags charged its customers to use inner tubes is taxable under the amusement tax. The AHC's decision here, and this Court's decisions in *Greenbriar I*, *Westwood*, and *Six Flags*, holding that the fee is not taxable because a more "specific" taxing provision that might have applied, but

by its plain language does not, somehow exempts this transaction entirely from tax is contrary to legislative intent and ultimately unworkable. The cases contain neither any analysis explaining why the lease tax and the tax on meals and drinks are more "specific" than the amusement tax, nor any guidance to taxpayers and the Director in determining which taxing provisions of § 144.020 are more "specific" than others.

For nearly twenty years before this Court's decision in *Greenbriar Hills I*, well-settled law provided that *all* fees paid in or to a place of amusement were taxable. *See Blue Springs Bowl*, 551 S.W.2d at 599. The purpose of § 144.020 is to impose taxes, not to exempt transactions from tax. Section 144.021; *J.B. Vending*, 54 S.W.3d at 188. If one subdivision of § 144.020 clearly taxes a transaction, then that transaction is taxable no matter whether it falls under a tax exemption contained within an entirely different taxing provision. It simply makes no sense to look to other taxing provisions within the same statute that by their plain language do not tax the transaction and somehow conclude that the transaction cannot be taxed at all. Merely because a transaction is

taxable under one provision of §144.020.1, but not under any of the other eight subdivisions of that subsection, does not mean that the taxing provisions are in conflict

In *Greenbriar I*, this Court held that a transaction is excluded from tax when two taxing provisions arguably apply to a transaction, one that taxes the transaction and a more "specific" one that does not. In *Westwood*, this Court extended that rationale and held that a transaction, which was purportedly taxable under two taxing provisions, is nevertheless exempt from all taxation when a tax exemption contained within the more "specific" taxing provision exempts the transaction from tax. Although "[t]ax laws are to be construed strictly against the taxing authority . . . that rule does not require that statutory language be ignored and not given meaning that reasonably accords with the apparent intention of the legislature as expressed in the statute." *L & R Distrib. Co.*, 648 S.W.2d at 95.

Moreover, in *Westwood*, *Six Flags*, and now in this case, a tax exemption applicable only to one tax — the lease tax — has now been applied to exempt a transaction from an entirely different tax — the amusement tax — to which the exemption

does not apply. A provision exempting a transaction from a specific tax should not be extended to apply to a transaction that is clearly taxable under a wholly different taxing provision. *Compare State ex rel. Powell v. Capps*, 381 S.W.2d 852, 859 (Mo. 1964) ("[T]hese are two different taxes authorized by different statutory provisions to be made at different times, and we cannot by implication read into one statute an exception contained in the other which is contrary to the plain, concise and unequivocal language used.").

3. The specific-vs.-general theory of taxation violates several well-established rules of statutory construction.

Applying the lease tax exemption to the amusement tax violates rules of statutory construction applicable to provisos. As explained above, the lease tax provision containing the exemption is a proviso; it limits or restricts the general language preceding it, which in this case is the lease tax itself. *See Lonergran*, 53 S.W.3d at 130. A proviso can have no existence apart from the statutory language it limits or qualifies. *See Kiburz*, 208 S.W.2d at 288. Thus, the lease tax exemption should not have been construed as applying to exempt transactions from a separate taxing

provision — the amusement tax.

The *Greenbriar I*, *Westwood*, and *Six Flags* decisions are also contrary to other well-settled rules of statutory construction. Primary among these is that when statutory language is clear and unambiguous, then a court need not construe the statute. *See Corvera Abatement Tech., Inc. v. Air Conservation Comm'n*, 973 S.W.2d 851, 858 (Mo. banc 1998). Moreover, courts should not "resort to statutory construction to create an ambiguity where none exists." *Baldwin v. Director of Revenue*, 38 S.W.3d 401, 406 (Mo. banc 2001). In *Greenbriar I*, *Westwood*, and *Six Flags* the amusement tax clearly applied to tax the transaction, while the other so-called "specific" provisions did not. Because no ambiguity existed concerning application of the amusement tax, it was unnecessary to construe the taxing statute to find that the transactions were not taxable based on negative implications flowing from other inapplicable taxing provisions.

Even if an ambiguity existed, other well-settled rules of construction were ignored. One of these requires that an entire legislative act must be considered together and all provisions harmonized if possible. *Baldwin*, 38 S.W.3d at 405.

"Statutory provisions relating to the same subject matter are . . . to be construed together" and "read . . . consistently and harmoniously." *Id.* In addition, statutes "should be construed in a manner to harmonize any potential conflict between . . . subsections." *Hovis v. Daves*, 14 S.W.3d 593, 596 (Mo. banc 2000). Finally, the rule that specific statutes control over general ones "applies only in situations where there is a 'necessary repugnancy' between the statutes." *Greenbriar III*, 47 S.W.3d at 352 (quoting *State ex rel. City of Springfield v. Smith*, 344 Mo. 150, 125 S.W.2d 883, 885 (Mo. banc 1939)).

The *Greenbriar I* and *Westwood* courts did not attempt to harmoniously construe the taxing provisions contained in § 144.020.1. Instead of first resolving any potential conflict among its subdivisions, this Court immediately applied the rule that specific statutes control over general ones and assumed that the taxing provisions contained in § 144.020.1 were in conflict when none necessarily existed. It then applied what it deemed to be the more "specific" subdivisions, which by their plain language did not apply to tax the

transactions in question, when no "necessary repugnancy" existed among those subdivisions. No necessary repugnancy exists simply because one provision taxes a transaction in question while that transaction is not encompassed under the plain language of another taxing provision. In *J.B. Vending*, this Court expressly recognized that the taxing provisions at issue in *Greenbriar I* — the amusement tax and the meal-and-drink tax — were not actually in conflict. *J.B. Vending*, 54 S.W.3d at 189 n.2. The dissent in *Six Flags* applied the same reasoning to the amusement and lease taxes and concluded that these two taxes were not in conflict, and even if they were, that neither on its face appeared to be more specific than the other. *Six Flags*, 102 S.W.3d at 534 (Wolff, J., dissenting).

Another overlooked rule of statutory construction applicable to this issue provides that when the legislature amends a statute courts presume that it is aware of all existing and unamended provisions of the statute. *See Graves v. Little Tarkio Drainage Dist.*, 134 S.W.2d 70, 81 (Mo. 1939). The amusement tax, first enacted in 1933, had been in place for thirty years when the General Assembly passed the lease tax in 1963. 1933-34 Mo. Laws Extra Session 157, § 2A(a); 1963

Mo. Laws 196; *see also Columbia Athletic Club v. Director of Revenue*, 961 S.W.2d 806, 812 (Mo. banc 1998) (Benton, C.J., dissenting). The decision in *Westwood* rests on the presumption that passage of the lease tax impliedly repealed the amusement tax to the extent that it taxed fees to use or "rent" equipment in places of amusement. But repeals by implication are not favored. *Graves*, 134 S.W.2d at 81. A later statute will operate as a repeal of an earlier one only when there is "such manifest and total repugnance that the two" statutes cannot stand. *Id.* The two statutes must be construed so that the later one will not operate as a repeal of the earlier statute; if the two statutes are "not irreconcilably inconsistent" then both must stand. *Id.*

Nothing suggests that in passing the lease tax the General Assembly intended to depart from the clear language of the amusement tax, which imposed, without qualification or limitation, a tax on all fees paid in or to a place of amusement. This is reinforced by the General Assembly's inclusion, within the provisions of the lease tax itself, of a specific amusement-tax exemption for charges pertaining only to the rental or lease of boats and outboard motors.

This intention was strengthened by the legislature's passage of § 144.518, exempting from tax the purchase of coin-operated amusement machines when tax is paid on the gross receipts derived from the use of those machines. Consequently, it simply makes no sense to presume that the General Assembly intended to create an amusement tax exemption in passing a provision intended solely to impose a tax on lease or rental transactions. In other words, courts should not presume that the legislature impliedly intended to create a tax exemption by negative implication when it passed a later statute imposing a tax on transactions not previously subjected to tax.

In passing these two tax exemptions, the legislature anticipated that other charges to "rent" or "lease" property for amusement or recreational activities within a place of amusement or recreation would fall under the amusement tax. Moreover, these tax exemptions reveal that the legislature intended that all fees paid to use property as part of an amusement or recreational activity would be subject to the amusement tax and that the lease tax would be restricted to transactions that constituted a true rental or lease

obligation.

4. The specific-vs.-general theory of taxation creates unpredictability, causes tax administration problems, and produces anomalous and unfair results.

Until *Greenbriar I*, no case had ever suggested that tax exemptions or exclusions could be manufactured by negative implications flowing from the language of the taxing provisions themselves. This approach is confusing to taxpayers and the Director alike in that it requires them to guess which taxing provisions are more "specific" than others and whether one taxing provision applies to tax a transaction or whether another applies to exclude the transaction from tax by negative implication.

In addition, the "mischief" perpetrated by the *Westwood* holding "unfortunately opens up many possibilities for tax avoidance in fee-for-use or rental situations." *Six Flags*, 102 S.W.3d at 534 (Wolff, J., dissenting). For instance, if Six Flags's fee to "rent" inner tubes was not taxable under either the amusement or lease tax, then what if Six Flags simply replaced a fee to enter the water park with a fee to "rent" or "lease" an inner tube that it required customers to

obtain to enter the wave pool or ride on the water rides. Taking this example one step further, what if Six Flags replaced his admission fee to enter its amusement park with a fee to "rent" or "lease" seats on one of its roller coasters or other rides. Which of these transactions, if any, would be taxable under the amusement tax or which would be exempt from tax by negative implication under the lease tax? Surely, if putting coins into a video game constitutes a "rental agreement," then what would prevent Six Flags from claiming that a fee to ride on its amusement rides was excluded from tax.

Moreover, would the result in a case like *Surrey's on the Plaza Inc. v. Director of Revenue*, 128 S.W.3d 508 (Mo. banc 2004), which held that horse-drawn carriage rides were places of amusement, be altered if the taxpayer "rented" or "leased" seats on the carriage and proved that sales tax was paid on its purchases of the horse and carriage? Neither *Greenbriar I*, *Westwood*, nor *Six Flags* offers answers, much less guidance, on these questions. These cases have simply invited more litigation to determine, on a case-by-case basis, which taxing provisions are more "specific" than others and which

transactions are exempt from tax because of negative implications flowing from other "specific" taxing provisions.

The inconsistency in this approach is starkly demonstrated by this Court's decision in *Tropicana*, in which this Court held that fees charged to use bowling shoes were subject to the amusement tax. The dissent in *Tropicana* correctly observed that there "is simply no principled distinction between the rental of golf carts from a country club and the rental of bowling shoes from a commercial bowling establishment" and that "*Blue Springs Bowl* — as interpreted by the majority — cannot be reconciled with the holding of *Westwood*." *Tropicana*, 111 S.W.3d at 412 (Limbaugh, J., dissenting). Indeed, what would prevent a bowling establishment from seeking a refund of taxes paid on the receipts from video and pinball machines, commonplace in many bowling alleys, while at the same time paying taxes on fees it charged to use bowling shoes? To the extent that the majority in *Tropicana* held that all fees paid in or to places of amusement were taxable without regard to the other taxing provisions contained in § 144.020.1, including the lease tax, it reached the correct result and returned the scope of the

amusement tax to the place it rightfully occupied before the emergence of the ill-considered dictum in *Greenbriar I*, which was unfortunately expanded by the holding in *Westwood*.

The adverse effect the general-vs.-specific theory of taxation has on the reasonable expectations of the General Assembly can be seen from the results that flow from the AHC's decision in this case. The record shows that Six Flags paid either $7.44 or $8.48 for the inner tubes it provided to its customers.[8] Nothing in the record, however, reveals what Six Flags charged its customers for each inner tube rental. Even if we assume that Six Flags's inner tube fee was less than what it paid for each inner tube, the record strongly suggests that Six Flags intended to "rent" each inner tube more than once. First, Six Flags "rented," rather than sold, the inner tubes to its customers, and, second, it prohibited customers from taking the inner tubes outside the water park. (L.F. 241-42). In addition, the tax rate on Six Flags's purchases of the inner tubes was substantially less than the rate

[8]L.F. 11, 13, 19, 52, 54, 60, 116, 118, 124, 164, 166, 172.

applicable to the fee Six Flags charged to use the tubes. The record shows that the tax rate applicable to Six Flags's inner-tube fee was 6.475% in 2000 and 7.075% in 2002,[9] but that the tax rate applicable to Six Flags inner-tube purchases was only 4.225%.[10]

The General Assembly certainly did not intend to tax only the inner tube purchases and forfeit the tax applicable to the inner-tube fee receipts simply because Six Flags, on its own, chose to pay on its inner-tube purchases and seek a refund of the other taxes its customers had already paid. Six Flags cannot deny that the amount of tax owed on its inner-tube purchases would be substantially less than the amount owed on its inner-tube fee receipts. The legislature did not intend that hundreds of thousands of dollars in inner-tube fee receipts, clearly taxable under the amusement tax, should go

[9]L.F. 9, 47-49, 109-13, 157-61.

[10]L.F. 14, 20, 61, 125, 173.

untaxed simply because Six Flags chose to pay tax when it purchased the inner tubes.

This case also raised the inequity issue recognized by Judge Wolff's concurring opinion in *Buchholz Mortuaries, Inc. v. Director of Revenue*, 113 S.W.3d 192 (Mo. banc 2003). In that case, a mortuary sought a refund for itself of taxes that it remitted, but that its customers actually paid, on sales of caskets and burial containers. *Id.* at 193. Although concurring in the result, Judge Wolff observed that if the mortuary kept the money the state was required to refund to it, then it would be "unjustly enriched from a refund of taxes that [the mortuary] itself did not actually pay." *Id.* at 195 (Wolff, J. concurring). *See also Shelter Mutual Ins. Co. v. Director of Revenue*, 107 S.W.3d 919, 926-28 (Mo. banc 2003) (Wolff, J., concurring in part and dissenting in part). Here too, Six Flags collected tax, though unlawfully it now claims, from its water park customers and seeks to recover for itself a windfall of money paid by others. If this Court orders a refund to be paid, then it should order Six Flags to hold the money in a constructive trust for its customers or to simply deny the refund unless Six Flags agrees to pass the refund

along to its customers. *See Buchholz*, 113 S.W.3d at 195-97 (Wolff, J., concurring).

Rather than order a refund in this case, however, this Court should abandon the specific-vs.-general theory of taxation applied in *Greenbriar I*, *Westwood*, and *Six Flags* and restore previous tax policy by holding that if a transaction is taxable under any taxing provision contained in § 144.020, then it should be taxed unless that transaction is otherwise exempt from tax based on a specific tax exemption. This Court should abandon the idea that tax exemptions can be manufactured by negative implications flowing from the statutes that impose taxes.

If the approach adopted in *Greenbriar I* and *Westwood* is not abandoned, this Court will continue to find itself on the same slippery slope it occupied after the decision in *Columbia Athletic*, which attempted to define the nebulous line separating exercise from recreation. In *Columbia Athletic*, this Court held that the health club involved in that case was not a place of recreation. 961 S.W.2d at 811. But this Court overruled *Columbia Athletic* in *Wilson's Total Fitness Center, Inc. v. Director of Revenue*, 38 S.W.3d 424 (Mo. banc 2001).

In *Wilson's*, the AHC had relied on factual differences between that case and *Columbia Athletic* in determining that the health club in *Wilson's* was a place of recreation. This Court became concerned, however, that the AHC's decision in *Wilson's* led "to the anomalous result that, in the same community, one health and fitness center's membership fees are subject to state sales tax while another health and fitness center's membership fees are not." *Id.* at 426. This Court concluded that this disparate treatment resulted from "the difficulty encountered by the AHC in attempting to sift through such details" in determining whether a health club was a place of recreation.

That same difficulty currently exists. Customers in places of amusement and recreation are currently deemed to "rent" golf carts, video games, and now inner tubes, and they pay no tax on the fees charged to use this property. But these same customers are not deemed to "rent" bowling shoes and must pay tax on the fees charged to use them. Did *Tropicana* signal the end of this disparity, or simply create more confusion and inconsistent treatment by making every charge or fee imposed in a bowling alley, including fees paid to play

video games, subject to the amusement tax, while exempting from the tax fees paid to play the very same video games at Six Flags or other places or amusement? The Director joins in the plea by the author of the opinion in *Westwood* and the dissent in *Six Flags* exhorting this Court to overrule both the dictum in *Greenbriar I* and those parts of *Westwood* and *Six Flags* applying the specific-vs.-general theory of taxation to exclude the fees at issue in those cases from the amusement tax. The holding in those cases is contrary to the reasonable expectations of the General Assembly and should be abandoned.

CONCLUSION

The AHC erred in setting aside the Director's decision denying Six Flags's refund claim and in awarding Six Flags $23,490.73 in sales taxes Six Flags collected from its customers and remitted to the Director. The AHC's decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains 13739 words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on April 11, 2004, to:

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